IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 6, 2000 Session

H. DALE MINOR v. FARMERS INSURANCE EXCHANGE, ET AL.

Appeal from the Circuit Court for Coffee County
No. 30,121 John W. Rollins, Judge

No. M2000-01217-COA-R3-CV - Filed September 5, 2002

The defendant group of California-based insurance companies contracted with the plaintiff to represent it in Coffee County. Because the plaintiff was an established, licensed independent agent he was ineligible to represent the defendant under its guidelines to avoid which the recruiting official of the defendant described the plaintiff's prior occupation as a nurseryman. The contract provided that in the event the plaintiff resigned he would not solicit or accept defendant's policy holders for a period of one year. After five years the plaintiff resigned, and sought to recover the monetary benefits available to him in accordance with the contract. The defendant resisted payment, relying on the non-compete provision since the plaintiff admitted that he solicited the defendant's policy holders. Plaintiff argued, inter alia, that the non-compete provision was unenforceable because the defendant was fully aware of the fact that he represented other companies and for five years freely switched his clients to and from the defendant with other companies. Recovery was allowed. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

BEN H. CANTRELL, P.J., M.S., PATRICIA J. COTTRELL, J., WILLIAM B. CAIN, J.

W. Brantley Phillips, Jr., Nashville, Tennessee, for the appellants, Farmers Insurance Exchange, et al.

James D. Lane, II, Tullahoma, Tennessee, for the appellee, H. Dale Minor.

OPINION
PER CURIUM

I.

On application of the plaintiff, a civil warrant was issued by the Clerk of the General Sessions Court for the recovery by the plaintiff of the balance owing under the "contract value"

provisions of an Agent Appointment Agreement with the defendant, who appealed an adverse judgment to the Circuit Court where the case was heard *de novo* and without a jury.

The defendant [referred to in the singular for convenience] filed a counterclaim in the Circuit Court alleging that in November 1993 the plaintiff executed an Agent Appointment Agreement whereby he agreed to serve as an agent for the defendant in Coffee County. This Agreement provided, inter alia, that for a period of one year following the termination of the agency relationship, the plaintiff would not "directly or indirectly solicit, accept, or service the insurance business of any policyholder of record in this district." The counterclaim sought recoupment of lost premium income, prejudgment interest, and attorney fees.

The plaintiff resigned his Agency effective December 30, 1998. Five days later the defendant by letter informed him that the residual contract value was $20,135.59 which would be paid in three semi-annual installments, the first of which accompanied the letter.

The defendant alleged that in July 1999 it learned that the plaintiff was violating the non-compete provision of the Agreement by accepting business from current policyholders and "placed them with other insurance carriers," in violation of the covenant not to compete.

The plaintiff filed his answer to the counterclaim admitting the execution of the Agency Agreement. He admitted that "he has written policies for former policyholders of the defendant during the twelve months following the termination of his Agency Agreement." He also admitted that the Agreement included a non-compete provision as alleged, but denied its enforceability.

The case was tried on February 1 and 2, 2000, on the issues of (1) whether the plaintiff was entitled to recover the balance of the contract value with interest and attorney fees, and (2) whether the plaintiff had breached the non-compete provision of the Agreement. The trial judge found that the defendant failed to carry the "burden of proof relative to its counterclaim" which was summarily dismissed, and found that the plaintiff was entitled to recover the balance of the contract value of $13,042.37 plus interest and attorney fees.

The defendant appeals, and presents for review two issues: (1) whether the court erred in refusing to enforce the non-compete provision, and (2) whether the court erred "when it required the appellants to perform their remaining obligations under the parties' contract despite plaintiff-appellee's admitted material breach of his obligations arising from the non-compete provision contained in the parties' contract." The second issue is subsumed into the first, and we will focus our analysis on the issue as re-stated by the plaintiff: whether the non-compete agreement is enforceable. Our review is *de novo* on the record. We presume the correctness of the judgment unless the evidence otherwise preponderates. Rule 13(d) Tenn. R. App. P.

II.

The defendant did not appeal the dismissal of its counterclaim for failure of proof of damages. The thrust of its argument is that the contract residuals should be equated to its damages owing to the plaintiff's breach of contract; stated differently, that its damages are at least equal to the contract residuals, and that it owes the plaintiff nothing.

The posture of the case is not questioned, and the plaintiff does not question the claim of the defendant that it may properly assert non-liability on account of the plaintiff's alleged breach of the contract. We will treat the case as the parties treat it, and discuss the dispositive issue of whether the covenant is valid and enforceable. If the covenant cannot be legally enforced, the plaintiff is entitled to recover.

The trial judge opined from the bench that the covenant not to compete would be enforceable absent a letter written by another of the defendant's agents, Wayne Davis, which we reproduce:

> December 16, 1998
>
> Dear Valued Client,
>
> The Farmers Insurance Agency in Tullahoma is no longer in business. Your policy has been assigned to my office for service.
>
> I have managed the Farmer Insurance Office in Franklin County since 1989. Our office has a tradition of fast, fair and friendly service.

The trial judge reasoned that this letter, mailed about 15 days before the plaintiffs resignation was effective,[1] "changed the rules here."

The plaintiff resigned as agent for the defendant in Coffee County when he became disenchanted with defendant's premium increases, inter alia. His right to resign was not disputed, and the defendant recognized the plaintiff's entitlement to the residual contract value of $20,135.59, until "the plaintiff cashed his first check."

III.

Following his resignation the plaintiff allegedly switched a number of policies to other companies whom he represented. This action motivated the defendant to conclude that the plaintiff was in violation of the covenant not to compete. We cannot agree that the Wayne Davis letter "changed the rules," for at least two reasons: first, because there is no evidence that Davis was

[1] The Agreement provided for termination by the agent or company upon three months written notice, or in the event of a breach, upon 30 days written notice, or immediately by mutual consent, or by the defendant for specified reasons, one of which was "switching insurance from [the defendant] to another carrier."

authorized in the premises,[2] and, more importantly, because, in point of fact, the plaintiff had already ceased his agency activities on behalf of the defendant. The letter merely informed defendant's policy holders of the truth: that the plaintiff was no longer associated with the defendant.

IV.

The covenant not to compete is reasonable in duration and scope. It prohibits the plaintiff, for a period of one year following the termination of his agency, from soliciting, accepting, or servicing the insurance business of any policyholder of record in Coffee County. We find nothing unreasonable about such contractual provisions.

It is not disputed that the plaintiff received a legal consideration for his agreement not to compete; the limitation of one year is not assailed, the plaintiff would suffer no economic hardship, and, absent the agreement, the plaintiff would obviously gain an unfair advantage. *See,* ***Allright Auto Parks, Inc. v. Berry***, 409 S.W.2d 361 (Tenn. 1966).

The peculiar facts of this case require that the *validity* of the covenant be distinguished from its *enforceability* for the following reasons.

The Agency Agreement was executed in November 1993 following extensive negotiations. The plaintiff was licensed as an independent insurance agent in March 1976. Initially, the defendant declined to contract with him because of his prior experience, but the defendant's representative, apparently intent upon placing an Agent in Coffee County, later called him for further discussion, stating, "if you will just come down here and fill out an application, I will take care of it."

The representative, Mr. Barkaszi, filled out the application, which the plaintiff signed, and which described his prior occupation as a *nurseryman.*[3]

The plaintiff was thereupon hired and began his agency work in February 1993. He continued his representation of other companies - as many as 50 - and Mr. Barkaszi, and his superior, were aware of this fact. He "moved a lot of . . . clients to Farmers because they had a better rate." He was never questioned about his practice of 'moving' clients from another company to the defendant, or vice-versa. Following his termination, the plaintiff continued his practice of switching clients from one company to another, and switched a number of clients from the defendant to other companies.

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[2] So far as the record reveals, Davis was a contemporary agent for the defendant in another County. When the plaintiff resigned, the defendant had no agent in Coffee County.

[3] It was the defendant's employment practice to train new agents and arrange for their licensure, rather than hire experienced or established agents. It was the defendant's official who chose to describe the plaintiff as a "nurseryman," knowing that for 17 years he had been a licensed, independent agent for many insurance companies.

The evidence clearly reveals that the defendant was fully aware of the plaintiff's history as an independent agent, and of his representation of a host of companies at the time he contracted with the defendant which continued throughout the five years of his relationship with the defendant. It is not disputed that the defendant at no time objected to the plaintiff's activities. Under these circumstances, we agree with the plaintiff's argument that the defendant effectively waived its right to insist upon the plaintiff's strict performance of the contract. ***Tennessee Adjustment Service v. Miller***, 390 S.W.2d 696 (Tenn. Ct. App. 1964). As stated in ***W. F. Holt Co. v. A & E Electric Co., Inc.***, 665 S.W.2d 722 (Tenn. Ct. App. 1983) in order to constitute a waiver, a party's conduct must reasonably manifest an intention not to claim the right at issue. In the case at Bar, initially and for five years thereafter, the defendant's acts and course of conduct were clear, unequivocal and decisive. *See,* ***Knoxville Rod & Bearing, Inc. v. Bettis Corp.***, 672 S.W.2d 203 (Tenn. Ct. App. 1983).

We hold that the defendant effectively waived its right to enforce the non-compete provision, and the judgment is accordingly affirmed at the costs of the appellant.

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